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No. 06-117

Supreme Court, U.S.
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In the
# Supreme Court of the United States

ERNEST EUGENE BRADY and MARRITTA KAY BRADY, husband and wife; JAMES DEAN BRADY, a single man, FLOSSIE MARIE BRADY, a single woman,
*Petitioners*,

v.

ABBOTT LABORATORIES, INC., an Illinois corporation; ROSS PRODUCTS, a division of Abbott Laboratories, Inc.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONERS' REPLY BRIEF

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## I. Abbott's Manufactured Waiver Argument Does Not Change The Fact That The Ninth Circuit Has Entered A Decision Which Conflicts With Its Own Earlier Decision On The Same Important Issue.

In utter disregard of the 1980 Arizona Groundwater Code, Abbott manufactures a waiver argument predicated upon a false distinction between a common law action for damages and a statutory action for damages. As a matter of law, however, Section 45-545 of the Code **unconditionally** provides that "in **any** action to recover damages...**any** landowner" may sue, and it then sets forth the "damage rules applicable to **all** transportation of groundwater". Neither the Arizona Supreme Court, nor the Ninth Circuit, nor the District Court, nor the Code itself, distinguishes between common law actions for damages and statutory actions for damages, nor do they require statutory actions to the exclusion of common law actions; all merely hold that the Code permits "**any** action" for damages.

It was for this very reason that the Bradys' counsel acknowledged to the Ninth Circuit at oral argument that the Bradys were not relying on any statutory claim under the Code, precisely because **they did not have to rely on the Code** since the Code **unconditionally** authorizes "**any** action" for damages, which certainly includes the Bradys' common law action here. Contrary to Abbott's manufactured argument, the Bradys did not waive or disclaim anything; they merely affirmed the express provisions of the Code to the Ninth Circuit, which then erroneously ignored this fundamental principle of Arizona groundwater law, to the unconstitutional detriment of thousands of farmers like the Bradys and all other federal reserved groundwater rights holders throughout the arid Southwest.

In all their earlier decisions after the promulgation of the Code, the Ninth Circuit, the District Court, and the Arizona Supreme Court repeatedly recognized that the Code permits "**any** action" for damages, and they repeatedly upheld numerous victims' common law actions for damages arising out of the illegal pumping of Arizona's precious groundwater supply.

In *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983), the Ninth Circuit adopted the District Court's analysis of Arizona groundwater law, stating, "**The transporter could be sued for damages, however, if it damaged other landowners who owned land over the same groundwater basin or aquifer.**" *Cherry v. Steiner*, 543 F. Supp. 1270, 1274 (D. Ariz. 1982)(emphasis added). The Ninth Circuit further adopted the District Court's statement that "**the transporter is subject to damages**" if others like the Bradys were harmed by the depletion of the groundwater. *Cherry v. Steiner*, 543 F. Supp. 1270, 1276 (D. Ariz. 1982)(emphasis added). Neither the Ninth Circuit nor the District Court ever held, as Abbott so speciously argues here, that the victim must specifically assert a statutory cause of action rather than a common law cause of action, or be left without a remedy.

In its earlier decision, the Ninth Circuit likewise adopted the Arizona Supreme Court's analysis of Arizona law in *Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), stating that Prescott's claim of immunity under the Code "**did not preclude Chino Valley from recovering damages**" for the harm suffered due to Prescott's pumping of the groundwater. *Cherry*, *supra* at 691; *Chino Valley*, *supra* at 80, 638 P.2d at 1326 (emphasis added). Again, neither the Ninth Circuit nor the Arizona Supreme Court ever held that the victim was required to assert a statutory action for damages under the Code to the exclusion of a common law

action in order to recover damages. Abbott's false distinction between a statutory cause of action and a common law cause of action–manufactured out of thin air to support its otherwise unsupportable waiver argument–therefore is meritless as a matter of law. *Cherry, Chino Valley, supra.*

## II. The Old Common Law Defense Of Reasonable Use Was Eviscerated By The 1980 Groundwater Code.

Abbott now suddenly pretends that the old common law defense of reasonable use survived unscathed notwithstanding the passage of the 1980 Groundwater Code. Abbott's pretension is disingenuous given its Opening Brief in the Ninth Circuit, wherein Abbott admitted that the Code "**legislatively overruled**" the old common law doctrine of reasonable use.

In stark contrast to Abbott's dishonesty, the Ninth Circuit recognized in *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983) that the 1980 Groundwater Code materially changed the old common law doctrine of reasonable use such that groundwater pumpers were no longer immune from liability for harm to adjoining landowners solely because their pumping benefitted the property from which the groundwater was extracted.

The Ninth Circuit's erroneous decision below, which so clearly conflicts with its earlier correct decision in *Cherry, supra,* is poignantly revealed by the authoritative treatise "Arizona Environmental Law Manual" published by the State Bar of Arizona, which states that the Code "**essentially did away with the reasonable use doctrine** (emphasis added). Arizona Environmental Law Manual, Chapter 3.2, *Water Law*, §§ 3.2.4.2 and 3.2.4.2.5 (Nicholas J. Wallwork ed. 1995).

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins–**a former Arizona attorney**–correctly recognized this fundamental principle of Arizona law, citing to authoritative treatises which state that the Code "**replaced the traditional reasonable use doctrine**." *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924 (9th Cir. 2006). Justice Hawkins further correctly observed that the 1980 Groundwater Code "**dramatically altered the groundwater landscape [and] significantly modified the rights of landowners to remove groundwater underlying their land**." *Id.* at 925.

Furthermore, in *Cherry, supra*, the Ninth Circuit recognized that the Arizona Supreme Court had already held that, **unlike** the old common law doctrine of reasonable use, the 1980 Groundwater Code protected a landowner's right to the "usufruct" of the groundwater. *Cherry, supra* at 693, n.1. Abbott's illegal pumping destroyed the Bradys' legally protected usufruct right to the groundwater. There is not one state or federal court decision in the country which supports the Ninth Circuit's Opinion below that **illegal** pumping constitutes a "reasonable use". **Indeed, illegal pumping cannot, as a matter of law, ever constitute the "reasonable use" of either the groundwater or the property from which it was withdrawn**.

Abbott's conclusory allegation that the Arizona Supreme Court "reaffirmed the continued validity of the old common law doctrine of reasonable use...on four separate occasions" is a gross misstatement of the case law. Contrary to Abbott's distortions, the Arizona Supreme Court was addressing only the issue of **actual ownership** of groundwater, not whether there was a remedy for damages to **usufruct rights** caused by the **illegal** pumping of groundwater. Abbott's citation to the *Chino Valley* decision as ostensible authority for its allegation

that the Bradys' usufruct right affords no protection against damage to the groundwater is simply wrong because the Arizona Supreme Court was not addressing a landowner's usufruct rights, but only "the common-law concept of **absolute ownership**" of groundwater. *Chino Valley* at 82. Indeed, the Court ultimately held that "The right of the owner to groundwater underlying his land is to the **usufruct** of the water and not to the **water itself**." *Id.*

The Bradys filed an action for damages to their usufruct rights, the very rights the Arizona Supreme Court held were protected by the 1980 Groundwater Code. Section 45-545 of the Code unconditionally states that "in **any** action to recover damages...**any** landowner" may sue. The Ninth Circuit erroneously ignored these fundamental principles of Arizona groundwater law, and thereby deprived the Bradys, as well as thousands of other farmers and federal reserved groundwater rights holders, of the equal protection of the 1980 Groundwater Code, which was promulgated for the express purpose of protecting them and their precious groundwater supply from damage and destruction.

Abbott's quibbling about the Bradys' standing to direct the Court's attention to the imminent and devastating harm that will be suffered by the thousands of similarly situated farmers and federal reserved groundwater rights holders only serves to highlight the important constitutional issues at stake here for this country's farmers, Native Americans, and our national park system. Indeed, even Abbott acknowledges that this Court has repeatedly carved out an exception when such important constitutional issues are at stake. *Drysdale v. United States*, 491 U.S. 617 (1989); *Barrows v. Jackson*, 346 U.S. 249 (1953).

In direct conflict with its own earlier decision on the same important issue, the Ninth Circuit has bestowed absolute immunity upon all civil and criminal defendants who damage or destroy the groundwater of farmers and other federal reserved groundwater rights holders throughout the arid Southwest and Ninth Circuit, right in the middle of one of the worst droughts in history. Its aberrant decision jeopardizes the precious groundwater rights of thousands of farmers and Native Americans in the very part of this country which so desperately needs the protections of their respective State's Groundwater Codes.

The Bradys' Petition raises precisely the kind of important Constitutional issues of nationwide importance that this Court can, and should, consider, before other courts begin to follow the Ninth Circuit's aberrant decision to the ultimate destruction of this nation's precious groundwater supply.

## III. Abbott's Argument That It Never Claimed Statutory Immunity Under § 45-541 Of The Groundwater Code Is Patently False.

Abbott's belated allegation that it never claimed statutory immunity under the Code defies credulity given its pleadings in the District Court and in the Ninth Circuit. Abbott makes this argument now, however, in an misguided attempt to insinuate that the Bradys raised the statutory issues for the first time on appeal. The record on appeal repeatedly refutes Abbott's allegation.

In defense against the Bradys' negligence claim in the District Court, Abbott contended that the Bradys "also ignore the fact that the Groundwater Code specifically authorizes dewatering permits, see A.R.S. § 45-518, as well as transportation of groundwater off of the land where it is

pumped and within the same groundwater sub-basin. See A.R.S. § 45-541(A)."

In defense against the Bradys' nuisance claim in the District Court, Abbott contended that the Bradys were not entitled to recover any damages because "the Legislature specifically allowed transportation of groundwater within a sub-basin, and such transportation is not subject to payment of damages. See A.R.S. § 45-541." Abbott even contended that the Bradys' reliance on relevant Arizona case law was "misplaced" because all of that case law was "outdated" and had been "superceded by the Groundwater Code."

In its proposed Findings of Fact and Conclusions of Law filed in the District Court, Abbott repeatedly cited to A.R.S. § 45-541 and contended that it was statutorily immune from liability for destroying the Bradys' pecan orchard.

In its section of the Amended Joint Proposed Final Pretrial Order filed in the District Court, Abbott repeatedly contended that it was statutorily immune from liability under the "Arizona State Groundwater Code."

Most recently, in its Opening Brief filed in the Ninth Court, Abbott cited to A.R.S. § 45-541 and contended that it is statutorily immune from liability for destroying the Bradys' pecan orchard. Abbott even contended that a decision of the Arizona Supreme Court cited by the Bradys had been "legislatively overruled" by A.R.S. § 45-541.

All of this undisputed evidence proves that Abbott repeatedly asserted the affirmative defense of statutory immunity in the District Court, and that it continued to do so on appeal. Contrary to Abbott's allegation, it is not the Bradys who now attempt to assert a new argument under the

Code; rather, it is Abbott who continued to assert on appeal that which it repeatedly asserted as an affirmative defense in the District Court: the statutory immunity defense under A.R.S. § 45-541. The Bradys merely responded to Abbott's affirmative defense in the District Court with all of the evidence of Abbott's fraudulent concealment of its illegal dewatering activities, because this body of evidence proved, among other things, that Abbott was not entitled to statutory immunity under A.R.S. § 45-541, and that the Bradys were entitled to punitive damages, as the District Court so held.

## IV. Abbott's Continued Reliance On the 1953 *Bristor* Case Reveals The Clear Error Of The Ninth Circuit.

The Ninth Circuit's sole support for its Opinion below was an old Arizona Supreme Court decision from 1953, *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953), citing to an even older decision of the Washington Supreme Court from 1935, *Evans v. City of Seattle*, 47 P.2d 984 (1935).

The Arizona Supreme Court, however, later held that groundwater pumpers no longer had immunity under the old common law doctrine of reasonable use as espoused in its earlier decision in *Bristor* because the Arizona Legislature had passed the 1980 Groundwater Code:

> The statements in *Bristor* and *Jarvis* do not mean that rights to the use of groundwaters cannot be modified prospectively by the Legislature.... **The doctrine of rule of property has no operation as against subsequent legislation** (emphasis added).

*Chino Valley*, *supra* at 81.

In its earlier decision in *Cherry, supra*, the Ninth Circuit agreed with the Arizona Supreme Court when it adopted the District Court's recognition that, given the passage of the 1980 Groundwater Code, it was "misplaced" to rely upon "selected passages of Arizona case law [which] ignore the actions of legislatures and courts throughout the country." *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982).

Abbott's pretension that the passage of the 1980 Groundwater Code had no effect upon the old common law doctrine of reasonable use is summarily refuted by the Arizona Supreme Court, which has held that Arizona's rapidly dwindling groundwater required the 1980 Groundwater Code to "**restrict rights**" and "**abolish the prevailing uses of groundwater**" just as many other States throughout the country had done. *Chino Valley*, *supra* at 83. Indeed, the Arizona Supreme Court has held that the very title of the Code put groundwater users on notice that their rights under the old common law doctrine of reasonable use would be "**significantly affected**" by the Code. *Chino Valley*, *supra* at 84 (emphasis added).

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins also correctly recognized that the Arizona Supreme Court in yet another case "clearly seems to have assumed" that the 1980 Groundwater Code protected victims like the Bradys, as well as all federal reserved groundwater rights holders, from the illegal pumping of their groundwater. *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 925 (9th Cir. 2006). Justice Hawkins' wisdom demonstrates the erroneous, and ultimately unconstitutional, nature of the Ninth Circuit's decision.

## CONCLUSION

The Ninth Circuit's reported decision eviscerates longstanding groundwater law in the very part of the country which so desperately needs the equal protection of that law. The Bradys implore this honorable Court to intervene and correct this manifest, and unconstitutional, injustice.

The Bradys therefore respectfully request the Court to grant their Petition for a Writ of Certiorari, vacate the Ninth Circuit's Opinion and Order, and thereby restore the equal protection of the law to the Bradys and the thousands of other farmers, Native Americans, and all present and future federal reserved groundwater rights holders throughout Arizona and the arid Southwest and Ninth Circuit.

RESPECTFULLY SUBMITTED,

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